UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company, Complainant, v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange, Respondents.	Docket No. EL00-95-020
Investigation of Practices of the California ISO and the California Power Exchange	Docket No. EL00-98-019
Removing Obstacles to Increased Generation and Natural Gas Supply in the Western United States	Docket No. EL01-47-000
Section 210(d) Proceeding Applicable to Electric Utilities in California	Docket No. EL01-72-000

REQUEST FOR REHEARING BY THE CALIFORNIA ELECTRICITY OVERSIGHT BOARD OF THE MAY 16, 2001, ORDER GRANTING MOTIONS FOR EMERGENCY RELIEF

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2000), and Section 313 of the Federal Power Act, 16 U.S.C. § 8251, the California Electricity Oversight Board ("Board") hereby requests rehearing of the Commission's May 16, 2001 *Order Granting Motions for Emergency Relief in Part and Deferring Action on Other Aspects of Motions and Proposed Order Under Section 210(d) Directing Interconnections with Qualifying Facilities and Establishing Further Procedures*, 95 FERC ¶ 61,226 (2001) ("May 16 Order"). The Board's request for rehearing seeks Commission clarification. Specifically, the Board requests that the Commission clarify on rehearing that (1) excess power generated by qualifying facilities

("QF") must be sold in California and (2) the definition of excess QF power was not intended to abrogate QFs' firm capacity contractual obligations.[1]

I.

BACKGROUND

On December 8, 2000, the Commission granted temporary waiver of the technical regulations relating to QF status.[2] By this action, the Commission sought to "*increase generation supply for the California markets* by allowing California QFs to enter into bilateral contracts for the sale of excess QF power."[3] "Excess QF power" is defined as "power above what has been historically sold from a facility to the purchasing utility. A facility's seasonal average output during the two most recent years of operation will define historical output."[4] The waiver extends through April 30, 2002.[5]

Alleging that the purpose of the temporary waiver was being obstructed, Ridgewood Power LLC and the California Cogeneration Council filed separate motions for emergency relief, seeking, among other things, (1) a declaration that to the extent a utility is delinquent on payments to a QF, that QF can sell 100 percent of its output to a

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[1] The May 16 Order is interlocutory with respect to interconnection issues under § 210. 16 U.S.C. § 212(c)(1) and 18 C.F.R § 385.713. However, the definition of excess QF power and the circumstances governing the terms of those sales fall outside the scope of § 210 and therefore are final for purposes of triggering a right to rehearing. The Board assumes that the Commission intended to limit its statement that "this proposed interconnection order shall not be reviewable in any Court, since all determinations in this order are preliminary," only to the § 210 proceedings. See May 16 Order, slip. op. at p. 17.

[2] *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent System Operator and the California Power Exchange*, 93 FERC ¶ 61,238.

[3] May 16 Order, slip. op. at p. 3 [emphasis added].

[4] *Id.* at p. 2, fn. 1.

[5] *Further Order Removing Obstacles to Increased Electric Generation and Natural Gas Supply in the Western United States*, 95 FERC ¶ 61,255.

third party at negotiated rates and (2) an order that utilities must provide interconnection and transmission services to facilitate excess QF power third-party sales. The May 16 Order confirmed that QFs may sell excess QF power to third-party purchasers. The May 16 Order further ruled that California QFs may sell all of their output to third parties only if permitted by a California court and that California utilities must provide interconnection and transmission services to accomplish third-party sales. The Commission instituted further procedures pursuant to section 210 of the Federal Power Act to resolve any disputes concerning interconnection.[6]

II.

THE DEFINITION OF EXCESS QF POWER SHOULD NOT BE ALLOWED TO SUPPLANT EXISTING CONTRACT PROVISIONS

The May 16 Order explicitly preserves the respective rights under QF contracts: "We emphasize that the action we are taking herein does not modify or abrogate existing contracts."[7] The Commission's intent is clear and reflects limits placed on its jurisdiction. Nevertheless, as demonstrated by the QF briefs in the ongoing § 210 proceeding, QFs have seized on the definition of excess QF power in an attempt to evade existing contractual obligations.

As noted above, excess QF power is defined in the May 16 Order as "power above what has been historically sold from a facility to the purchasing utility. A facility's seasonal average output during the two most recent years of operation will define historical output." The definition itself fails to expressly reference the predicate need for a contractual right to sell to third parties. Yet, not all QF contracts are uniform. For

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6 May 16 Order, slip. op. at p. 2.

7 *Id.* at p. 12.

example, standard offers 1, 2, 3 and interim standard offer 4 all contain pricing provisions that enable a QF to choose either a "net energy output" energy sales option or a "surplus energy output" energy sales option.[8] The net energy option requires the QF to sell all of its generation to the utility.[9] No excess power exists under the contract. Thus, a QF's contractual ability to make excess QF power sales depends in the first instance on the contract language selected by the QF.

This omission of any reference to the QF contract in the definition of excess QF power is problematic and has created the unjustified impression that all power generated above the facility's seasonal average can be sold to third parties. The Commission should, and must, clarify that the definition of excess QF power is triggered only where the QF's contract permits third-party sales. Otherwise, not only is the Commission's explicit intention not to abrogate existing contracts a hollow and deceptive statement, but the May 16 Order would exceed the Commission's jurisdiction.

The Commission lacks authority to abrogate existing QF contracts. The Public Utility Regulatory Policies Act ("PURPA") sets out "an elaborate enforcement scheme in which the roles of the Commission, the state public utilities commissions (PUCs) and the federal courts are specifically delineated." *Connecticut Valley Electric Company v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000). PURPA delegated to the Commission the tasks of establishing the general guidelines, such as defining avoided costs, under which QF transactions would take place and for determining QF status. See 16 U.S.C. § 824a-

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[8] Standard offers refer to various standard offer contracts adopted by the California Public Utilities Commission ("CPUC") for the purchase and sale of QF power. For the origin of standard offers see 8 CPUC2d 20(1982), 10 CPUC2d 553 (1982) and 12 CPUC 604 (1983).

[9] Net energy output is generally the QF's gross output in kilowatt-hours less station use and transformation and transmission losses to the point of delivery into the utility's system.

3(a), 18 C.F.R. § 292.207; *New York State Electric & Gas Corporation v. Saranac Power Partners, LP*, 117 F.Supp.2d 211, 216 (N.D.N.Y 2000). In contrast, the implementation of PURPA through contracts, and supervision and administration of those contracts, was delegated to the state commissions. 16 U.S.C. § 824a-3(a). Consequently, the Commission "has no power – under either PURPA or the FPA – to revise, rescind or otherwise alter the force and effect" of QF agreements. *New York State Electric & Gas Corporation*, 117 F.Supp.2d at 235.

In addition to the statutory restraints on the Commission's power to modify QF contracts, a failure to clarify the definition of excess QF power to preserve contractual limitations will likely result in further injury to California and the public interest in violation of § 210. Without clarification, generation currently under contract may be considered excess generation. Reallocating such generation from QF contracts to the market will increase the overall cost of electrical power to California consumers and/or further increase the burden on the California Department of Water Resources in covering the utilities' "net short" position. Increasing the cost of power to California contravenes the interests sought to be promoted by the May 16 Order. Accordingly, consistent with the settled contractual expectations of the parties to the QF contracts, the Commission must grant rehearing to clarify that firm capacity requirements in existing QF contracts have not been superseded by the definition of excess QF power.

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III.

QFs SHOULD BE REQUIRED TO SELL EXCESS POWER ONLY IN CALIFORNIA

The May 16 Order creates ambiguity whether excess power generated by California QFs must be sold exclusively to serve California load. On the one hand, the May 16 Order states that "QFs may sell 'excess QF power' to purchasers within the WSCC," or otherwise stated, "that any QF in the Western Systems Coordinating Council (WSCC), may sell 'excess QF power' to third-party purchasers within the WSCC."[10] On the other hand, the May 16 Order provides that "sales of excess QF power may take place outside the context of the pricing provisions of existing QF contracts and may be at negotiated rates, *provided that the power is sold in California*."[11]

The ambiguity arises because California is a subset of the WSCC. However, any interpretation of the May 16 Order that would permit California QFs to sell power for export outside the California markets would defeat the Commission's stated goal to "increase generation supply for the California markets." The Commission should not allow energy currently under contract for the benefit of California end-users to be sold out-of-state.

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[10] *Id.* at pp. 2 and 11.

[11] *Id.* at p. 13 [emphasis added].

IV. CONCLUSION

For the reasons set forth above, the Board respectfully requests that the Commission grant its request for rehearing and clarify that that (1) excess QF power must be sold in California and (2) the definition of excess QF power was not intended to abrogate QFs' firm capacity contractual obligations.

Dated: June 14, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary for this proceeding on or before June 14, 2001, pursuant to Rule 2010(a) of the Commission's Rules of Practice and Procedure.

Dated at Sacramento, California, this 14th day of June, 2001.

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